No. 78-777

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-60a) is reported at 389 A.2d 277. The earlier panel opinion (Pet. App. 63a-87a) is reported at 369 A.2d 1063.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-62a) was entered on June 14, 1978. The time for

filing a petition for a writ of certiorari was extended to and including November 11, 1978. The petition for a writ of certiorari was filed on November 10, 1978, and was granted on February 21, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the reliable in-court identification testimony by the victim of a crime, who immediately reported the crime to the police, should have been suppressed as the fruit of a later unlawful detention of respondent that produced the initial identification of him as the offender.

STATEMENT

Respondent was indicted and tried before a jury for three robberies of different women in a restroom near the Washington Monument, in violation of D.C. Code §§ 22-2901 and 22-3202 (1973). The jury convicted him of the robbery of Carol Owens and acquitted him of the other two robberies. He was sentenced to four years' probation under the Youth Corrections Act. After a divided panel of the District of Columbia Court of Appeals affirmed (Pet. App. C; 369 A.2d 1063, 1064), the court considered the case en banc and reversed, two judges dissenting (Pet. App. A).

1. Before trial, respondent moved to suppress all evidence showing his identification by the three victims as the robber. The evidence adduced at the suppression hearing established that on the morning of January 3, 1974, while Carol Owens was in one of

the stalls of the restroom, a man reached over the top of the partition, pointed a gun at her, and demanded $10, which she gave him (A. 9-10). When the assailant demanded more money, Owens told him she did not have any more. The assailant then forced entry into the stall and made sexual advances. Owens pleaded with him to leave, which he eventually did after warning her not to come out for 20 minutes, or he would return and shoot her (A. 10-11, 16-17).

The restrooms were well lit by fluorescent lighting, and Owens testified that she got a good look at her assailant for at least two and a half to three minutes (A. 10-11, 16-17). Owens described her assailant as dark complexioned, 16-18 years old, with smooth skin, and about 5'5" to 5'8" tall (A. 11). Twenty minutes after the robbery, she reported it to the police and gave them a description of the assailant (A. 11, 30-31).[1]

Three days later, in the mid-afternoon of January 6, 1974, a young man assaulted and robbed two other women, Sandra Denner and Ann Lawson, in a similar fashion in the same restroom. They also reported the incident to the police and provided a description matching the description given by Owens of the January 3 robber (A. 31; Pet. App. 3a).

Around noon on January 9, 1974, two Park Police officers saw respondent near the concession stand at the Washington Monument. The officers approached

[1] On the day of the robbery, police showed Owens about 100 photographs of possible suspects, but she did not identify any as her assailant (A. 11-12).

him, asked him his name and age, and told him that he matched the description of a suspect sought in connection with robberies at the Monument. Respondent gave the officers his name and said his age was 16. When asked why he was not in school, respondent replied that "he walked away from school." Respondent then left and went into the men's restroom. While he was there, the officers spoke to a tour guide who had reported having seen a young man "standing around" in the Monument area on the day of the January 3rd robbery. When respondent came out of the men's room, the tour guide told the officers that he thought that respondent was the person he had seen on January 3.[2] The officers then approached respondent again and detained him. Detective Ore, who was investigating the robberies, was immediately summoned. He tried to take several Polaroid photographs of respondent at the scene, but it was raining and the photographs did not develop properly. Accordingly, the officers took respondent to Park Police headquarters, where they photographed him, telephoned his school, and released him within an hour[3] (A. 32-33, 37, 40). Respondent was never formally arrested nor charged with an offense, and he never voiced objection to having his photograph taken (A. 38, 41-42).

[2] At trial the tour guide positively identified respondent as the person he saw near the scene of the January 3 robbery of Owens (A. 57).

[3] The officers took the photographs both pursuant to routine police procedures relating to possible truants (A. 32-33, 39-40; see D.C. Code § 31-201 (1973)) and to show them to the robbery victims (A. 37).

On January 10, 1974, the officers showed a photographic array, including a photograph of respondent, to Owens. She selected respondent's photograph as that of the person who had robbed her (A. 12-13). On January 13, Lawson also selected respondent's photograph from an array (A. 25). Respondent was again taken into custody, and on January 16 a Superior Court judge ordered him to appear at a lineup (Pet. App. 5a). At the lineup, Owens and Lawson positively identified respondent as their assailant (A. 13, 25). Denner did not review any photographic array or attend the lineup (A. 29).

At the conclusion of the suppression hearing, the trial court ruled that the detention of respondent at Park Police headquarters constituted an arrest and was improper because it was not supported by probable cause.[4] Although it did not find the photographic or lineup identification to have been suggestive, it ruled that both were fruits of the illegal arrest and that evidence of those identifications could not be

[4] We believe that the facts known to the officers at the time of their initial encounter with respondent and his tentative identification by the tour guide were sufficient to establish a reasonable suspicion that he was involved in criminal activities and to justify a brief detention for inquiry and for the purpose of taking respondent's photograph. While we entirely disagree with the court of appeals' characterization of petitioner's detention at Park Police headquarters as a "flagrant" violation of his Fourth Amendment rights (Pet. App. 44a), we do not here challenge the ruling of the courts below that the nature and extent of the detention exceeded permissible bounds. See *Dunaway* v. *New York*, No. 78-5066 (June 5, 1979). See also discussion *infra*, pages 50-53.

introduced at trial (A. 44). Finding, however, that the victims' identification of respondent at trial would be based on observations made at the time of the crime and would be independent of the photographic and lineup identifications, the court declined to suppress the victims' in-court identifications of respondent (A. 44-45).

At the trial, Owens testified that there was absolutely no doubt in her mind that respondent was her assailant. She stated that the restroom was well lit and that at one point during the incident respondent sat on her lap and was only a few inches from her (A. 52; see generally A. 46-53). Lawson also positively identified respondent as the person who robbed her and Denner (A. 65-66). Denner was less sure of her identification, but selected respondent as the person in the courtroom most closely resembling her assailant (A. 60-61). Respondent denied committing the robberies on either January 3 or January 6 (Tr. 172-179) and presented a witness who testified that respondent went to a movie with him on January 6 (Tr. 153). The jury convicted respondent of the January 3 robbery and acquitted him of the robberies on January 6 (Tr. 239-240).

2. A panel of the District of Columbia Court of Appeals affirmed (Pet. App. 63a-87a). The panel held that Owens' in-court identification testimony was not a fruit of the January 6 arrest of respondent within the meaning of the "fruit of the poisonous tree" doctrine, but rather was a product of Owens' independent recollection of the crime (*id.* at 69a-

73a). Alternatively, the panel held that even if Owens' testimony could be regarded as causally related to respondent's arrest, the policies of the exclusionary rule did not require suppression. The court noted that "[i]n the final analysis, what [respondent] seeks is no less than an immunity from any prosecution"—a result that would impose a social cost outweighing "whatever incremental deterrence arguably might be provided by barring the victims' in-court testimony, in addition to the photographic and lineup identifications which were excluded by the trial court * * *" (*id.* at 80a-81a).

The court of appeals en banc reversed, two judges dissenting (Pet. App. 1a-60a). The court held that the victim's in-court identification should have been suppressed as the fruit of the January 9 detention, notwithstanding that the identification was reliable and based on the witness's independent recollection of the crime. The court reasoned that the testimony was the fruit of the detention because the photograph then taken led to the identification of respondent as the assailant, which led to his rearrest, which led ultimately to his trial in which the testimony was given (*id.* at 20a-21a). Thus the court stated (*ibid.*):

> The causal chain posited by appellant runs as follows: the unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified appellant; this resulted in his reapprehension, which yielded a court-ordered lineup identification and,

> eventually, in-court identification testimony during prosecution of the case. Thus, appellant says, the courtroom identification testimony was "actually discovered by" (i.e., made available to the government through) "a process initiated by the unlawful act." *United States* v. *Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962).
>
> * * * * *
>
> Appellant Crews clearly demonstrated a causal connection between the unlawful arrest and the in-court identification in this case.

The court rejected the government's argument that respondent's identity would inevitably have been discovered through routine investigation, declining to adopt the inevitable discovery doctrine in its jurisdiction (*id.* at 28a-29a). Finally, the court rejected the contention that the victim's testimony was sufficiently attenuated from the illegality attendant upon the brief detention on January 9. The court distinguished this Court's decision in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), on the grounds that the time between the arrest and the testimony (three and a half months) was "quite a brief period" and in any event largely irrelevant (Pet. App. 38a-39a), that there were no "significant" intervening events (*id.* at 39a-43a), that the police misconduct here was "flagrant" and "purposeful" (*id.* at 44a), and that Owens' free will in testifying did not "represent an attenuating, intervening force" (*id.* at 52a n.37).[5]

[5] The court also rejected the argument that suppression of Owens' testimony would be contrary to the principles of *Frisbie* v. *Collins*, 342 U.S. 519 (1952), and *Ker* v. *Illinois*, 119 U.S. 436 (1886), which held that an unlawful arrest does not impair the court's jurisdiction to try the defendant. Although the court expressed doubts about the continuing validity of *Frisbie* and *Ker* (Pet. App. 8a; but see *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975)), it held that those decisions were in any event inapposite because in the instant case the court was only suppressing evidence and was not dismissing the indictment (Pet. App. 15a & n.7).

Judges Nebeker and Harris dissented (Pet. App. 55a-60a). In their view, Owens' in-court identification testimony could not reasonably be viewed as a fruit of respondent's detention on January 9, and the majority's decision had the consequence of "permanently silenc[ing] the victim of a crime whose ability to testify was unrelated in any way to the unconstitutional seizure of [respondent]" (*id.* at 60a), a result they deemed incompatible with *Ceccolini*.

SUMMARY OF ARGUMENT

This case concerns the admissibility of reliable and independent in-court testimony of a robbery victim identifying her assailant. The court of appeals held the victim's testimony to be an inadmissible "fruit" of an illegal detention of respondent because, during the course of the detention, police obtained a photograph of respondent that was used to identify him as the culprit. We advance three grounds for the conclusion that the court of appeals erred: (1) because the police knew the identity of the witness and were aware that she could identify her assailant prior to and independently of the illegal detention of respondent, the in-court testimony cannot properly be

viewed as a suppressible "fruit" of the subsequent Fourth Amendment violation; (2) even if the in-court testimony could be viewed as a "fruit," the principles of attenuation indicate that it is admissible; and (3) even if it could otherwise be viewed as a non-attenuated fruit of the illegal detention, the testimony of the victim of a crime, particularly a crime of violence, should not be subject to suppression.

I

The first and most important question posed by this case is whether evidence lawfully acquired by investigating officers prior to or independently of a Fourth Amendment violation should be deemed a "fruit" of the violation, when the violation simply enables the police to link the lawfully acquired evidence to a particular suspect. Although the evidence in this case happens to be witness testimony, the "fruits" analysis employed by the court of appeals, if valid, could also lead to the suppression of physical evidence, such as fingerprints or items of clothing left at the scene of the crime.

A. This Court has never had occasion to confront directly a "fruits" question of the kind presented in this case. The Court's previous decisions respecting the "fruits" of illegal conduct all involved the more conventional situation in which the challenged evidence has been acquired by the police as a result of a chain of events proceeding from an initial unlawful act. In such cases the court has inquired whether the challenged evidence was itself illegally obtained

by the police, and the doctrine of attenuation has been the means by which the Court has sought to determine whether the nexus between the illegality and the evidence is sufficiently great to justify suppression.

We submit that evidence lawfully acquired should simply not be subject to the Fourth Amendment exclusionary rule. The evidence in this case—Owens' ability to identify respondent as her assailant—became available to the police when she reported the robbery; it was not the product of a Fourth Amendment violation. The court of appeals, however, suppressed that lawfully acquired evidence because the detention of respondent was an important step in the chain of events that enabled the witness to identify respondent at the trial.

We acknowledge that there is a sense in which it may be said that Owens' testimony was a "fruit" of respondent's detention. As a matter of common sense, however, it seems strained to say that the victim's ability to identify her assailant was illegally acquired by the police despite the fact that they already "possessed" this evidence when respondent was detained.

B. To the extent this Court's prior decisions shed light on this question, they support our position. In *Frisbie* v. *Collins*, 342 U.S. 519 (1952), the Court held that a prosecution could properly proceed despite the fact that the defendant's presence in court was the result of an illegal seizure of his person. While it is true that *Frisbie* concerned the trial court's jurisdiction and not the admissibility of evidence, we

think it unlikely that the Court that allowed the trial to go forward would have countenanced exclusion of all the prosecution's evidence on the ground that the illegal seizure of the defendant was indispensable to the successful use of that evidence. In both *Frisbie* and the instant case, the fact that evidence otherwise lawfully acquired gained prosecutive utility by virtue of an illegal arrest does not require its exclusion.

In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), the prosecution introduced fingerprints that were obtained during an unlawful arrest of the petitioner, matching them to those found at the scene of a rape. The Court held that this set of fingerprints (analogous to Owens' pretrial photo identification of respondent) should have been suppressed. On the court of appeals' theory in this case, however, all the evidence identifying Davis as the rapist, including the victim's testimony, would similarly have been subject to suppression. Far from suggesting any such result, the Court's opinion indicates the contrary. See 394 U.S. at 725 n.4; see also *id.* at 730 (Stewart, J., dissenting).

C. Our position is further bolstered by considerations of exclusionary rule policy. The incremental deterrence benefits that might derive from adoption of the court of appeals' analysis are outweighed by its potential costs to society and to the administration of justice.

We do not deny that, to the extent supression of evidence influences police behavior, the risk of the "retroactive taint" of evidence already possessed will

provide some increment of deterrence against unlawful detentions to aid in suspect identification. We suggest, however, that this increment will not be substantial in light of the impact of conventional applications of the exclusionary rule. Thus, in the absence of attenuating circumstances, an illegal detention will result in suppression of statements made by the suspect, evidence found on his person, and pretrial identifications produced during or by the detention. In-court identification testimony could also be excluded if it is found not to have a basis independent of the pretrial identification. Moreover, in-court identifications, made months after the crime, usually have far less persuasive force than prompt pretrial identifications. In light of these costs, the marginal deterrence benefits of retroactive taint are unlikely to be substantial.

The costs of the court of appeals' theory of "retroactive taint" are substantial, however, particularly in contrast to its limited and speculative benefits. In the instant case, the theory results in silencing the victim of a crime. But the theory cannot effectively be limited to a narrow category of cases. Rather, whenever an unlawful arrest or detention has led to identification of the defendant as the perpetrator of a crime, the taint would bar the use of all lawfully acquired evidence that gained utility to the prosecution because it was linked to the defendant as a result of the detention. The consequence would be to immunize illegally arrested defendants from effective prosecution in a large class of cases, even though the prosecution

would not be offering any evidence that was itself unlawfully obtained.

Furthermore, because the Fourth Amendment violation would lack the normal causal relationship to the challenged evidence, it would prove difficult to utilize attenuation analysis to limit the impact of the "retroactive taint" principle. It is hard to give meaningful application to considerations of temporal proximity, intervening cause, and witness free will when the acquisition of the challenged evidence is lawful and precedes the Fourth Amendment violation. The attempt to apply attenuation analysis on a case-by-case basis would, we believe, require an expenditure of judicial energies far in excess of any sensible and meaningful results that could be obtained.

II

Even if this Court accepts the principle of retroactive taint and approaches this case by application of attenuation analysis, Owens' testimony should not be subject to suppression. While the factors of temporal proximity and intervening cause usually can have little meaningful application when the evidence was acquired prior to the violation, we note the presence in this case of one significant intervening event that was indispensable to the admission of Owens' testimony and not predictable at the time respondent was improperly detained: the ruling by the trial court that Owens' in-court testimony was reliable and independent of the suppressed pretrial identifications. As for the factor of witness free will, it is difficult

to imagine a case in which that factor is more clearly present. Moreover, we submit that the relatively brief detention of respondent for the limited purpose of taking his photograph was not a flagrant violation of his Fourth Amendment rights. Finally, we note that the court of appeals appeared to give no weight to this Court's injunction in *United States* v. *Ceccolini*, 435 U.S. 268, 277-280 (1978), that exclusion of live witness testimony should be ordered reluctantly and should be limited to cases involving the most direct nexus between the violation and the acquisition of the testimony. See also 18 U.S.C. 3502.

III

Finally, even if Owens' testimony could properly be regarded as an unattenuated fruit of respondent's detention, the suppression of the willing, volunteered, and reliable identification testimony of the victim of a crime is, as the court of appeals stated in *Payne* v. *United States*, 294 F.2d 723 (D.C. Cir. 1961), "not the right way to control the conduct of the police, or to advance the administration of justice." Whatever considerations may be appropriate for other kinds of evidence, depriving an individual of an opportunity to appear at the bar of justice and testify against the person who injured him threatens to produce a resentment and disrespect for the law considerably greater than that which may be engendered by exclusion of other kinds of evidence.

I. THE IDENTIFICATION TESTIMONY OF THE ROBBERY VICTIM WAS NOT A "FRUIT" OF THE UNLAWFUL DETENTION OF RESPONDENT

The court of appeals held that the testimony of the victim, Carol Owens, identifying respondent as the person who robbed her on January 3, 1974, should have been suppressed because (1) that testimony was the evidentiary "fruit," for exclusionary rule purposes, of respondent's illegal detention on January 9, and (2) the use of that testimony was not sufficiently attenuated from the initial illegality to dissipate the taint. Both conclusions are necessary to the court's holding, and we argue in Point II, *infra*, that even assuming the correctness of the first, the court was wrong in concluding that the taint, if any, was not attenuated. We argue in this Point that the court's principal error is in its first conclusion, *i.e.*, that Owens' testimony was the fruit of respondent's detention for exclusionary rule purposes.

In the conventional setting in which this Court and the lower federal courts have explicated the "fruit of the poisonous tree" doctrine, there has been an illegal search or arrest by law enforcement officers initiating a chain of events leading to the acquisition of the challenged piece of evidence. In such cases, the courts are called upon to decide whether there is a sufficiently direct nexus between the illegality and the acquisition of the evidence to justify application of the exclusionary rule. Because of the multitude of factual configurations in which this type of question arises, it has proved exceptionally difficult to evolve "bright-line" tests by which the correct result may be

ascertained. The principal governing standard is attenuation, *i.e.*, the extent to which the acquisition of the challenged evidence is proximate to or remote from the illegal act and the extent to which its acquisition is the product of significant intervening and untainted causes. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Consideration may also be given in certain classes of cases to the nature of the evidence that is sought to be suppressed (see *United States* v. *Ceccolini*, 435 U.S. 268 (1978)) and to the purposefulness or flagrancy of the violation (see *Brown* v. *Illinois*, 422 U.S. 591, 604 (1975)).

The present case, however, involves an entirely different kind of relationship between the challenged evidence—the identification testimony of Owens, the robbery victim—and the Fourth Amendment violation. Owens' knowledge of the appearance of her assailant and other circumstances of the crime was known to the police before any illegal act on their part, and thus, unlike the typical "fruits" case, the improper detention did not initiate a chain of events leading to the acquisition of the challenged evidence. Rather, the detention served the function of giving prosecutive utility to evidence already possessed by the police. The basic question, accordingly, is whether evidence already possessed by the police prior to any illegal act on their part (or developed by them wholly independent of any such act) should be viewed as a potentially suppressible "fruit" solely on the ground that the illegal act served to link the lawfully obtained evidence to the individual and give it prosecutive utility at trial.

It is our basic submission in this case that evidence lawfully acquired should never be subject to exclusion when the sole "taint" concerns the manner in which it was linked to the particular defendant. Under the view of the court of appeals, on the other hand, any evidence linking the defendant to the offense is a potentially suppressible "fruit" of an illegal arrest or detention precisely because that action enabled the investigating officers to realize that the defendant is indeed the culprit.

Which of these positions is sounder is a matter that cannot be resolved by sheer force of logic or by semantic analysis of the metaphor "fruit of the poisonous tree." While the challenged evidence in this case was itself in no way the product of respondent's detention—the police already knew of Owens, and her capacity to identify respondent existed independent of the detention and the photograph procured during that detention—it was nevertheless the unlawful detention that led to the use of the evidence against respondent at his trial. Moreover, because there is no causal chain leading from the illegality of the discovery of the evidence, attenuation analysis is exceedingly difficult to apply.

However intractable the problem may appear as a matter of abstract logic, we submit that prior decisions of this Court in closely analogous contexts point to the conclusion that lawfully obtained evidence is not to be deemed a suppressible product of an unlawful arrest or detention that gives that evidence prose-

cutive utility. This conclusion is, moreover, substantially reinforced by considerations of exclusionary rule policy.[6]

A. The Fruits Theory of the Court of Appeals Has Never Been Endorsed by This Court and Is Inconsistent With the Principles Established in Analogous Cases.

Almost all of the decisions of this Court in which evidence has been challenged as the tainted fruit of official misconduct have involved physical evidence, information, or testimony about such information that had been acquired by the police after and as a result of their misconduct. See, *e.g.*, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) (documents discovered in the course of an illegal

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[6] Our point here relates to cases in which the only nexus between the challenged evidence and the unlawful conduct is the linking of lawfully acquired information to the particular defendant—a nexus that, as noted, is entirely different from the conventional nexus between evidence and unlawful conduct that the courts have considered in applying the exclusionary rule. In our view, therefore, there is a significant difference between evidence like Owens' in-court identification testimony and such evidence as her post-arrest identification of respondent's photograph. The relationship between the unlawful detention and the latter kind of evidence is an example of the conventional relationship to which the "fruit of the poisonous tree" concept has been applied: but for the unlawful detention, the police would not have obtained the photo identification. To such evidence, established principles of attenuation can be meaningfully applied. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972).

search); *Nardone* v. *United States*, 308 U.S. 338 (1939) (evidence obtained after and allegedly as a result of an illegal wiretap); *Wong Sun* v. *United States*, *supra*, and *Brown* v. *Illinois*, *supra* (incriminating statements by the defendants made after their unlawful arrest); *Davis* v. *Mississippi*, 394 U.S. 721 (1969) (fingerprints taken from the defendant during his unlawful detention); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (testimony of a witness whose knowledge of criminal activity was learned by the police after and, in a strictly causal sense, as a result of an unlawful search).

Those and other decisions at least implicitly indicate that the evidentiary products to which the exclusionary rule applies have been generally understood to consist of information that the police have acquired after and as a result of their unlawful conduct. Indeed, in the few cases in which the claim has been made, the Court has expressly rejected challenges to the use of lawfully acquired evidence where the challenge is based on some subsequent misconduct. We submit that the decision of the court of appeals in this case cannot be reconciled with the principles established by those cases.

In *Frisbie* v. *Collins*, 342 U.S. 519 (1952), the defendant Collins had been tried and convicted of murder by a state court in Michigan. He later contended in a petition for habeas corpus that the conviction was invalid because he had been brought to trial in Michigan only as a result of having been

kidnapped by Michigan officers in Illinois, in violation of the Fourth Amendment and the Federal Kidnapping Act. This Court rejected the claim and unanimously reaffirmed the principle established in *Ker* v. *Illinois*, 119 U.S. 436 (1886), that

> the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." * * * [The *Ker* line of cases] rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

342 U.S. at 522 (footnote omitted). This Court recently reaffirmed that principle in *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975), and *Stone* v. *Powell*, 428 U.S. 465, 485 (1976).

The principle of *Frisbie* and *Ker* is inconsistent with the court of appeals' holding that Owens' testimony was a fruit of respondent's detention for exclusionary rule purposes. Although the court of appeals concluded that *Frisbie* and *Ker* were inapposite because those cases concerned only the jurisdiction of a court to try a defendant and not the suppression of specific evidence (Pet. App. 6a-15a),

that distinction overlooks the principle of those cases and the rationale employed by the court of appeals itself in concluding that Owens' testimony was a tainted fruit. If, as the court of appeals held, evidence lawfully acquired by the police should be suppressed when a later unlawful arrest of the defendant is what makes that evidence useful and leads to its presentation at trial, then all of the evidence introduced against Ker or Collins, or any other defendant brought to trial by means violating their Fourth Amendment rights, should have been suppressed on the same principle. In those cases, as here, the value of that evidence, including any testimony by victims or eyewitnesses, was realized only by virtue of such Fourth Amendment violations. (See also pages 37-38, *infra.*) Yet it would be implausible to suppose that this Court in *Frisbie* and *Ker* was of the view that such evidence could not be used at trial, and that it held only that courts have jurisdiction over prosecutions that would in fact be impossible because the prosecution's evidence would all be inadmissible. Rather, *Frisbie* and *Ker* stand for the general principle that the Constitution does not require the extreme result of prohibiting a prosecution—including the necessary presentation of evidence in court and the matching of that evidence to the defendant in the courtroom—merely because in some sense an unlawful arrest was the *sine qua non* of the prosecution.[7]

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[7] It has been suggested that, because *Ker* and *Frisbie* were decided before *Mapp* v. *Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states, those cases would be decided differently today. See Pitler, *The Fruit of The Poisonous Tree, Revisited and Shepardized*, 56 Calif. L. Rev. 579, 599-601 (1968). See also *United States* v. *Edmons*, 432 F.2d 577, 583 (2d Cir. 1970), in which the court suppressed the identification testimony of victims in part on the ground that "whether the [Supreme] Court would now adhere to [*Frisbie-Ker*] must be regarded as questionable." As the court of appeals acknowledged here, that contention has been rejected by the great majority of the courts of appeals (see Pet. App. 8a-9a, collecting cases) and is plainly untenable in view of this Court's recent statements indicating its continuing adherence to the *Ker-Frisbie* doctrine. See *Gerstein* v. *Pugh*, *supra*, 420 U.S. at 119; *Stone* v. *Powell*, 428 U.S. 465, 485 (1976).

Although the Fourth Amendment violation here was far less egregious, the circumstances are analogous in some respects to *Davis* v. *Mississippi*, *supra*. In *Davis* a woman was raped and fingerprints of the apparent assailant were found at the scene. Without probable cause, the police rounded up a large number of Negro youths, including Davis, and obtained from Davis a set of fingerprints that matched those found at the scene of the crime. This Court concluded that evidentiary use of the fingerprints taken during the unlawful arrest (analogous to Owens' photo identification of respondent in this case) was prohibited as a tainted fruit of that arrest. There is no suggestion in *Davis*, however, that anything should have been suppressed other than the set of fingerprints taken during the arrest, and in dissent Mr. Justice Stewart made the point, not controverted by the majority, that other legally obtained fingerprints of the defendant

could be used at a retrial and matched with those found at the scene (394 U.S. at 730).[8]

It is significant that the majority in *Davis* did not disagree with the proposition stated by Mr. Justice Stewart, but concluded that it was irrelevant to the exclusionary rule. In the majority's view, whether or not the prosecution could easily obtain the same information by lawful means and match it at trial with other evidence lawfully obtained (*i.e.*, the fingerprints found at the scene) was immaterial because the exclusionary rule nevertheless requires the suppression of evidence actually obtained by unlawful means. 394 U.S. at 725 n.4.[9] The Court thus im-

[8] Thus, Mr. Justice Stewart stated (394 U.S. at 730; footnote omitted):

> Fingerprints are not "evidence" in the conventional sense that weapons or stolen goods might be. Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingertips can be exactly and endlessly reproduced.
>
> We do not deal here with a confession wrongfully obtained or with property wrongfully seized—so tainted as to be forever inadmissible as evidence against a defendant. We deal, instead, with "evidence" that can be identically reproduced and lawfully used at any subsequent trial.

[9] Thus, the Court noted with approval the statement of the court of appeals in a similar case, *Bynum* v. *United States*, 262 F.2d 465, 468-469 (D.C. Cir. 1958): "It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way." The Court also noted that "[o]n Bynum's retrial another set of fingerprints in no way connected with his unlawful arrest was used, and he was again convicted." 394 U.S. at 726 n.4.

plicitly recognized the distinction that we are urging between evidence acquired after and as a result of an illegal act—which is a fruit subject to suppression—and evidence lawfully obtained that merely becomes linked to the defendant through a later unlawful act—which is not. If the court of appeals is correct in this case, however, it would appear to follow not only that no other fingerprints could have been used against Davis, but that the testimony of the rape victim herself would have been subject to exclusion because of the role the illegally procured fingerprints played in identifying Davis as the culprit. (See also pages 37-38, *infra*.)

Finally, we believe that *United States* v. *Wade*, 388 U.S. 218 (1967), and related cases,[10] although involving somewhat different considerations, are instructive in this context and reflect a view at odds with the broad theory of tainted fruits adopted by the court of appeals. Those cases have established that evidence of a pretrial identification must be suppressed if the procedures employed in securing the identification were unduly suggestive, or if, subsequent to the attachment of a right to counsel, the defendant was deprived of assistance of counsel during a lineup. Nevertheless, the Court has permitted the victim or witness to make an in-court identification if that testimony is, as here, based upon an independent recollection untainted by the improper

[10] See, *e.g.*, *Gilbert* v. *California*, 388 U.S. 263 (1967); *Manson* v. *Brathwaite*, 432 U.S. 98 (1977).

pretrial identification procedures. See *id.* at 239-241.[11]

We recognize, as the court of appeals noted in distinguishing the *Wade* line of cases (Pet. App. 21a), that this Court was concerned primarily with the unreliability of suggestive or uncounselled identifications, and not with Fourth Amendment violations or their fruits. It is nevertheless worth noting certain parallels between those cases and this case. In all pretrial identification cases (including those involving uncounselled or unduly suggestive identification procedures), the ability of the witnesses to identify the suspect will influence, to a greater or lesser degree, the belief of the police in the suspect's guilt; indeed, it will often be a significant factor in the decision whether or not to prosecute. To the extent there can be said to be some causal nexus between a pretrial identification and the decision to prosecute, the wit-

[11] Indeed Congress has passed a statute mandating this result for trials in federal courts. 18 U.S.C. 3502 provides in pertinent part: "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence * * *." To the extent that such testimony refers to independent in-court identifications, the statute simply states the *Wade* rule and reflects the legislature's judgment that the suppression of such testimony would impose an unwarranted and unduly severe cost on society. To the extent the statute may be read to refer to identification testimony that is itself tainted by an impermissible pretrial identification, evidence of which is inadmissible under *Wade*, its validity has been questioned. See McGowan, *Constitutional Interpretation and Criminal Identification*, 12 Wm. & Mary L. Rev. 235, 249 (1970); *United States* v. *Edmons*, *supra*, 432 F.2d at 586.

ness's in-court testimony would, under the court of appeals' view, be a fruit of the identification; and if the pretrial identification was improper, the witness's in-court testimony should, under that view, be suppressed as a tainted fruit. Yet this Court has never suggested that independent and reliable in-court identification testimony should be suppressed as the fruit of a pretrial identification that violated the defendant's Fifth or Sixth Amendment rights, even though the prosecutive utility of the testimony may have been in a real sense enhanced by the prior illegality, and even though suppression might provide further deterrence against engaging in such procedures.[12]

[12] While this Court has not addressed the precise question, the great preponderance of the decisions of the courts of appeals on the matter have rejected the view of the court below that the independent identification testimony of witnesses or victims known to the police at the outset may be suppressed as the fruit of a pretrial identification resulting from an unlawful arrest. See *United States* v. *Young*, 512 F.2d 321, 323 (4th Cir. 1975), cert. denied, 424 U.S. 956 (1976); *Carson* v. *United States*, 332 F.2d 784 (5th Cir. 1964); *United States* v. *Hoffman*, 385 F.2d 501, 504-505 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968); *Golliher* v. *United States*, 362 F.2d 594, 602 (8th Cir. 1966); *Jacobson* v. *United States*, 356 F.2d 685, 688 (8th Cir. 1966); *Edwards* v. *United States*, 330 F.2d 849, 851 (D.C. Cir. 1964); *Payne* v. *United States*, 294 F.2d 723 (D.C. Cir. 1961); see also *Baker* v. *State*, 39 Md. App. 133, 383 A.2d 698 (1978); *Commonwealth* v. *Garvin*, 448 Pa. 258, 264-266, 293 A.2d 33, 37 (1972). We are aware of only three published opinions that have employed a theory similar to that of the court below to suppress the testimony of such witnesses or victims. *United States* v. *Barragan-Martinez*, 504 F.2d 1155 (9th Cir. 1974); *United States* v. *Edmons*, 432

While we have argued that none of this Court's decisions supports the decision below and that several of them are inconsistent with it in principle, we nevertheless recognize that the Court has not addressed the precise issue presented in this case and that no court has articulated a definition of fruits or general method of analysis that would be readily applicable to that issue. We therefore turn to a consideration of the general purposes and policies of the exclusionary rule, which we believe support recognition of the limiting principle we have suggested and

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F.2d 577 (2d Cir. 1970); cf. *United States* v. *Humphries*, No. 78-1622 (9th Cir. Jan. 19, 1979), petition for cert. filed, No. 78-1803. In *Edmons, supra*, the decision was based in part on the court's doubts about the continuing vitality of the *Ker-Frisbie* doctrine and also on the ground that the arrests were not made in "good faith" (432 F.2d at 583-584). A later Second Circuit opinion, however, permitted the in-court identification testimony of witnesses on the ground that the unlawful arrest leading to the pretrial identifications was made in "good faith." *United States ex rel. Pella* v. *Reid*, 527 F.2d 380, 383 (2d Cir. 1975).

Similarly, the courts of appeals have declined to apply a theory of retroactive taint to other evidence in the government's possession prior to an unlawful act that helps identify the individual as the culprit. For example, it has been consistently held that preexisting records in possession of the Immigration and Naturalization Service are not the fruit of a subsequent unlawful search or arrest that identifies a person as an illegal alien, and are admissible in his deportation proceeding. *Hoonsilapa* v. *INS*, 575 F.2d 735, 738 (9th Cir. 1978); *Ho Chong Tsao* v. *INS*, 538 F.2d 667, 669 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Martinez*, 512 F.2d 830, 832 (5th Cir. 1975); *Huerta-Cabrera* v. *INS*, 466 F.2d 759, 761-762 (7th Cir. 1972); cf. *Wong Chung Che* v. *INS*, 565 F.2d 166, 168 (1st Cir. 1977).

rejection of the court of appeals' expansive view of fruits.

B. The General Purposes and Policies of the Exclusionary Rule Do Not Support the Court of Appeals' Theory of Fruits.

The principal, if not the exclusive purpose of the exclusionary rule is to deter constitutional violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The fruit-of-the-poisonous-tree doctrine is a logical corollary of the rule in view of that purpose, since it is assumed that suppression only of evidence directly obtained by a violation, but no other fruits, would fail to provide an adequate deterrent.

At the same time, the Court had recognized in many cases that application of the exclusionary rule imposes significant costs on society. These costs include, of course, the failure of a certain number of prosecutions of guilty defendants because of suppression of evidence; but, perhaps more significantly, as the Court observed in *Stone* v. *Powell*, *supra*, 428 U.S. at 491, any widespread perception of undeserved windfalls to culpable defendants threatens to bring the law itself into disrespect and to undermine public confidence in the administration of justice. Accordingly, the Court has consistently applied the exclusionary rule on the basis of the general precept that, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its

remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

In accordance with that precept, this Court has recognized doctrines that limit the application of the rule, such as the requirement of "standing" and the theory of attenuation of taint. Such doctrines are largely based on the conclusion that in certain circumstances the incremental deterrent benefits that would result from suppression, although perhaps not negligible, do not outweigh the substantial social costs of suppression. See, *e.g.*, *United States* v. *Ceccolini*, *supra*, 435 U.S. at 275-276; *United States* v. *Janis*, *supra*, 428 U.S. at 453-454; *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974); *United States* v. *Calandra*, *supra*, 414 U.S. at 349, 351; *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). The same considerations of deterrence and social cost, as well as considerations of effective judicial administration, support the conclusion that suppression should be restricted to evidence uncovered by or as a product of the Fourth Amendment violation.

1. *The Court of Appeals' Theory Offers Limited Additional Deterrence Benefits.*

Under our analysis, the remedy of suppression would not be available unless the evidence in question came to light as the result of an illegal search or seizure or a chain of events proceeding causally from such a violation. As we discuss more fully below, the court of appeals' far more sweeping "fruits" concept would often bar virtually all of the prosecution's evi-

dence, however acquired, when the defendant's identity has been learned by virtue of an illegal arrest or detention. We cannot deny that the considerably more drastic impact of the court of appeals' analysis would, at least in theory, give the police some incremental incentive scrupulously to observe Fourth Amendment requirements in arresting or stopping persons suspected of possible involvement in criminal activity.[13] Nevertheless, we submit that the marginal deterrence that can reasonably be anticipated to flow from the broad exclusionary principle of the court of appeals is insufficient to justify its potential costs.[14]

Thus, accepting our more restrictive definition of the "fruits" concept, there remain significant disincentives to unlawful arrests of suspects in the hopes of matching them to witnesses or other evidence al-

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[13] As this Court has noted on several occasions, whether or how the exclusionary rule and its various ramifications has actually affected police behavior has not yet been empirically demonstrated. See, *e.g.*, *United States* v. *Janis*, *supra*, 428 U.S. at 449-453. The assumption of its deterrent value must be taken somewhat on faith.

[14] Although the *Wade-Gilbert* prohibition against conducting lineups in the absence of defense counsel is motivated in substantial part by concerns about the reliability of such identification procedures, the exclusionary rule fashioned in those cases was also designed to deter improper police conduct. See *Manson* v. *Brathwaite*, *supra*, 432 U.S. at 112; *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); *Gilbert* v. *California*, *supra*, 388 U.S. at 273. While the deterrent effect of the rule would undoubtedly have been enhanced by exclusion of independently-based in-court identification testimony of witnesses who have made identifications during such lineups, the Court has nevertheless ruled that such testimony is admissible.

ready known. First, as happened in this case, if the arrest is unlawful, pretrial identifications produced by the arrest are subject to suppression. This Court has noted that the probative value to a jury of pretrial identifications, made while the witness's memory is still fresh, is usually greater than an in-court identification made in a trial held months or years after the crime.[15] See *Gilbert* v. *California*, *supra*, 388 U.S. at 273-274 and n.3. See also *United States* v. *Higgans*, 507 F.2d 808, 811 (7th Cir. 1974); *Clemons* v. *United States*, 408 F.2d 1230, 1243 (D.C. Cir. 1968).[16] Second, any statement by the arrested individual, or evidence on his person or fruits thereof, would be subject to suppression. See, *e.g.*, *Brown* v. *Illinois*, *supra*. Finally, any unconstitutional arrest or detention subjects the officers to possible civil liability under, *inter alia*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). See, *e.g.*, *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).

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[15] The suppression of evidence regarding the pretrial identifications of respondent by the two other robbery victims may well have played a significant role in respondent's acquittal on those charges.

[16] Indeed, one jurist has expressed the view that "juries tend to be massively unimpressed by identification evidence which consists solely of identification of the defendant by the witness from the witness stand. * * * Trial judges of my acquaintance report that juries not infrequently acquit when they are given nothing but an in-court identification; and in some instances individual jurors have complained to the judge that, in not being told about pretrial identification, they were being treated like children." McGowan, *supra*, 12 Wm. & Mary L. Rev. at 241.

Thus, even if evidence already known to the police is not subject to retroactive taint as the result of an illegal arrest, substantial disincentives to such misconduct remain. Furthermore, it assumes an improbable degree of sophistication to suppose that police officers would act unlawfully on the basis of calculations regarding the inapplicability of the court of appeals' doctrine of retroactive taint. This case does not disprove the point; indeed, it illustrates it. The record shows that the officers took respondent to the police station at least in part for the purpose of obtaining a photograph they could show to the robbery victims (A. 33, 37). But it does not show they did so in purposeful, or even reckless, contravention of what they believed to be their lawful authority. To the contrary, the record indicates that they believed their actions to be lawful, and that belief, though perhaps not correct and not a defense to any Fourth Amendment violation,[17] was certainly not unreasonable. See note 28, *infra*. Thus, in this particular case the court of appeals theory of retroactive taint, even if understood by the officers to have been the law, would not have affected their conduct.[18]

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[17] See *Scott* v. *United States*, 436 U.S. 128, 135-137 (1978); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968).

[18] For that reason, as we argue below, the particular facts of this case militate against suppression under established attenuation principles, which recognize good faith and the non-flagrancy of the violation to be important factors in determining whether any taint was attenuated. The point we are making here, however, is that apart from the particular facts of this case, a rule requiring the retroactive taint of

Even if the officers had thought that their arrest of respondent would probably be held unlawful, however, and had engaged in a sophisticated calculation of the likely costs and benefits of that action employing our analysis, it seems highly unlikely that they would have made the arrest rather than pursue their investigation by other means. They would know that if they made the arrest they might well lose the benefit of any statement made by the suspect (cf. *Brown* v. *Illinois*, *supra*), as well as any pretrial identification or any evidence found on his person, and might also incur substantial civil liability. While their action might result in an in-court identification by the victim many months later, that is hardly a prospect they could rely on with confidence in view of the well-known vagaries of witnesses and the impeachability of identification testimony.[19] If some unconstitutional act were the only way of realizing that benefit, there might be sufficient incentive to overcome the significant risks. But in this case, and in most cases of this kind, other means were available by which the officers could have obtained respondent's photograph, or otherwise had Owens identify him, that would have been lawful and relatively easy.

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lawfully acquired evidence is not likely to have a significant incremental deterrent benefit even in cases where the police themselves believe that a particular course of conduct would be found unlawful.

[19] See *Manson* v. *Brathwaite*, *supra*, 432 U.S. at 113, n.14; McGowan, *supra*, 12 Wm. & Mary L. Rev. at 241.

Our point here is not that the police *would* inevitably have refrained from detaining respondent.[20] It is rather that in cases where the police themselves believe that their intended course of action would be unlawful, a rule requiring the suppression of the independent identification testimony of witnesses (or

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[20] In view of the purposes of the exclusionary rule, it is obviously not material that evidence unlawfully acquired *could* have or *might* have been obtained by lawful means. But in cases where it is shown that the challenged evidence would inevitably have been discovered, many courts have held that the exclusionary rule does not require suppression. See *Brewer* v. *Williams*, 430 U.S. 387, 406 n.12 (1977), in which the Court indicated that on retrial the *corpus delicti* "might well be admissible on the theory that the body would have been discovered in any event." See also *United States* v. *Cole*, 463 F.2d 163, 171-174 (2d Cir.), cert. denied, 409 U.S. 942 (1972); *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973); *United States* v. *Seohnlein*, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970); *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *Killough* v. *United States*, 336 F.2d 929 (D.C. Cir. 1964); *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963).

The courts of appeals have applied the "inevitable discovery" doctrine cautiously and have required a strong showing by the government that, in view of the course of investigation, considered in light of normal investigative practices, the evidence would inevitably have been disclosed. The court of appeals rejected our argument that such a showing had been made here, on the grounds both that it would not adopt the inevitable discovery doctrine in its jurisdiction and that the record did not in any event establish the necessary showing (Pet. App. 28a-35a). In light of the latter conclusion, we do not rely on the inevitable discovery doctrine itself. We do contend, however, that the availability of alternative means of obtaining a victim's identification in this case and generally are relevant considerations to the proper application of the exclusionary rule.

other evidence lawfully acquired) in addition to the ordinary fruits of that action is not likely to provide a generally significant increment of deterrence. Cf. *United States* v. *Ceccolini*, *supra*, 435 U.S. at 276.[21]

2. *The Costs of Exclusion Under the Theory of Retroactive Taint Are Excessive.*

While the incremental deterrence benefits to be derived from adoption of the court of appeals' theory of retroactive taint are limited and speculative, its potential costs to the sound administration of justice and to law enforcement threaten to be substantial—and, what is especially significant here, to be disproportionate to the benefits in a way that is manifestly not the case with the conventional fruits doctrine heretofore applied by this Court. Its consequence in this case is to prevent the victim of a crime from

[21] In *Ceccolini*, the Court made a similar point when it noted that a rule requiring the suppression of the testimony of a witness who was discovered as the result of an unlawful search but who was willing to testify was likely to have less of a deterrent effect than the ordinary suppression of tangible evidence. The Court said (435 U.S. at 276; footnote omitted): "The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." Although this case is different because the witness was known to the police before any illegal act (and for that reason, we submit, supports a general rule of admissibility that the Court declined to fashion in *Ceccolini* (see 435 U.S. at 274-275)), the point made by the Court is even more applicable in this context. When the only object of the police action is to obtain the physiognomy of a suspect (or a photographic reproduction of it), the likelihood that that could or would be obtained by legal means is extremely high, and the incentive to obtain it by unlawful means is correspondingly low.

testifying against her assailant—a result that most courts, understandably, have found to be unacceptable. See note 12, *supra*. But, as we have noted, the theory of retroactive taint, if accepted, would have implications far beyond the results of this case.

First, that theory cannot be limited to identification testimony, but logically includes any information lawfully acquired by the police that becomes linked to the defendant or acquires prosecutorial utility as a result of some subsequent misconduct. Suppose, for example, that in the course of a burglary the burglar inadvertently drops his wallet containing a photograph of himself (or leaves a fingerprint or any other potentially identifying evidence), which the police promptly discover in investigating the burglary. Months later the burglar is unlawfully detained (either in connection with the burglary investigation or some unrelated matter), and in the course of the detention the police notice that he matches the photograph found at the scene, and for that reason they arrest him and bring him to trial. Under the court of appeals' theory, the photograph (and testimony about how and where it was discovered) could never be admitted at trial because its very presentation in evidence and its prosecutorial utility were "made available to the government through " 'a process initiated by [an] unlawful act' " (Pet. App. 20a).

Although the court of appeals did not expressly say so, that is the necessary consequence of its rationale, because Owens' knowledge of the appearance

of her assailant is analytically no different from the photograph in the example. In both cases the police lawfully acquire information that they know to be of potentially identifying value, but they do not know the identity of the person whom it matches; and in both cases it is the unlawful detention that enables the police to match that information to the defendant.

Moreover, the evidence that is tainted under the court of appeals' theory of fruits would seem to be permanently tainted. At least it is difficult to see any rational or workable principle by which Owens' knowledge of the robbery and of the appearance of the robber could, after respondent was detained and she identified his photograph, ever be lawfully acquired or utilized. Indeed, the court of appeals in effect acknowledged the permanency of its theory of taint in rejecting the government's argument that any taint was attenuated by the lapse of time between the arrest and the trial testimony and by other events during that period (Pet. App. 38a-39a):

> [W]hile the initial arrest and the taking of the photograph did occur on January 9, 1974, the illegality in this case did not end on that date. The eventual re-arrest and confinement of Mr. Crews and his ultimate appearance at trial were all based on tainted facts (the government demonstrated no independent basis for re-arrest). Thus, the entire course of events was accomplished in violation of the Fourth Amendment.[22]

[22] Apparently seeking to mitigate the conclusion that it was in fact permanently suppressing the defendant, the court suggested that Owens' testimony might have been admissible if, after the January 9 arrest and subsequent photo identification, there had been "an identification of the accused by the same witness after a lawful arrest on another charge, or an identification by the same witness to a different team of detectives who had included a lawfully obtained picture of the accused in a standard photographic array" (Pet. App. 24a). This statement seems to suggest that, after the events of January 9, the police could have untainted Owens' knowledge of the crime by following respondent around until he committed some infraction for which he could be arrested, or by having "a different team of detectives" find (or perhaps take) some other photograph of respondent and show it to Owens in a standard array. If, as would almost invariably be the case, such further police activities were motivated by their belief, based on the tainted identification of the photograph, that they had the right man, it is hard to believe that the court of appeals would have found the taint removed. If it would, there would seem to be little point in suppressing her testimony in this case; if the suppression of her testimony is to have any point, it is difficult to see any rational grounds for ever admitting that testimony, or any other evidence tainted under the same theory.

In short, the logical implication of the court of appeals' theory is permanently to bar all evidence acquired by the police whenever some misconduct helps to connect it to the defendant and thus leads to its presentation in court.

It is true that in some cases applying ordinary exclusionary rule principles, the suppression of an item of evidence may as a practical matter preclude successful prosecution. But at least the exclusion of evidence discovered or acquired by virtue of an illegal search or seizure has a limited scope that can be accepted as in some sense proportional to the conduct sought to be deterred; it only reaches forward from the illegal act, and its impact in appropriate cases

can be ameliorated by principles of attenuation and independent source, principles that do not readily apply to a theory of retroactive taint.[23] Under the court of appeals' theory, in contrast, police officers can develop substantial information in a case, perhaps through a long and scrupulous investigation, only to have it all tainted through some later or unrelated event that helps connect it to the culprit. In such cases, it seems to us unreasonable to expect the police (or the public) to perceive the suppression of such evidence as proportional to the infraction.[24]

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[23] See pages 17, *supra;* 48-49, *infra.*

[24] A due concern for restraint and proportionality has influenced the judicial response to cases—analogous yet analytically distinct from retroactive taint cases such as the present case—in which an illegal search or seizure gives rise to police suspicion and prompts further investigation. When such investigation has been lawfully conducted, and the sole taint relates to the manner in which suspicion was initially aroused, courts have generally been reluctant to suppress the evidence produced by such investigations. As Judge Learned Hand stated in the remand of *Nardone* v. *United States*, 308 U.S. 338 (1939), the government should not be required to show that an initial illegality "has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich [*sic*] of the statute as so extreme an application of it would demand." *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), cert. denied, 316 U.S. 698 (1942). See also *United States* v. *Friedland*, 441 F.2d 855, 860-861 (2d Cir.), cert. denied, 404 U.S. 867 (1971); *United States* v. *Cella*, 568 F.2d 1266, 1286 (9th Cir. 1977); *United States* v. *Sand*, 541 F.2d 1370, 1376 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

More recently, however, the Ninth Circuit has ordered the suppression of evidence on the basis of the proposition rejected by Judge Hand and its own prior decisions, and we have filed a petition for a writ of certiorari to review that question. *United States* v. *Humphries*, *supra*, petition for cert. filed, No. 78-1803. In *Humphries*, the court also suppressed the testimony of a witness on a theory that is the same in principle as that relied on by the court below, and our petition also presents that question for review.

Furthermore, the impact of the court of appeals' theory of retroactive taint would not be confined to a relatively small class of unusual cases. It is standard and ordinarily appropriate police procedure to take photographs of arrested suspects to exhibit to witnesses or to retain in police files for possible future use, to place arrested suspects in lineups for identification by victims or eyewitnesses, and to conduct prompt post-crime showups of suspects arrested or detained shortly after an offense. If properly conducted, lineups, showups, and photo displays not only serve an investigative and evidence-gathering function, but often serve the interest of a detained suspect, who may be quickly released if the witnesses exonerated him.[25] Since there is always the possibility that an unlawful arrest or detention has preceded the use of the identification procedure, the court of appeals' theory of retroactive taint would exact a heavy price for error preceding the use of these routine and appropriate police procedures.

Finally, as we discuss more fully in Point III, *infra*, the theory of retroactive taint imposes particularly

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[25] See, *e.g.*, *Allen* v. *Estelle*, 568 F.2d 1108, 1112-1113 (5th Cir. 1978); *United States* v. *Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977); *Russell* v. *United States*, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969).

onerous costs when its effect is, as here, to prevent the victim of a crime of violence from testifying against his or her assailant. To the citizen who has sought the protection of the law and vainly invoked the machinery of justice, considerations of the Fourth Amendment and its enforcement are likely to be eclipsed by more fundamental questions about the government's fulfillment of its part of the social contract. See *Stone* v. *Powell, supra,* 428 U.S. at 491.

3. *Considerations of Judicial Administration Counsel Rejection of the Principle of Retroactive Taint.*

We have argued above that the cost to society and law enforcement of adopting the court of appeals' theory of retroactive taint would outweigh any incremental deterrent effect that it might have. It would be possible to attempt to limit those costs by seeking to apply, on a case-by-case basis, principles of attenuation developed in other contexts. Under such an approach, the propriety of suppression would depend upon whether, in the particular case, the violation was more or less "flagrant"; whether it was "exploited"; whether time, the witness's "free will" or other "intervening" circumstances were deemed sufficient to break the causal chain; or in general whether suppression would be sufficiently likely to deter police officers faced with the same situation in the future from violating the law to outweigh the adverse consequences. In Point II, *infra,* we argue that application of those principles to this case (awkward though we believe the process to be) establishes that suppression of Owens' in-court identification testimony was not appropriate.

In our view, however, significant considerations of judicial administration weigh against such a case-by-case approach and in favor of recognition of a general principle that evidence obtained by or known to the police independently of an unlawful search or seizure is not a suppressible product of that search or seizure simply because it is thereby linked to the particular defendant. We advert here to the judicial energies that will be expended seeking to resolve the factual and legal complexities of an issue that by its nature will not readily submit to easily applicable standards of decision. As one commentator has observed, soundly in our view, the formulation of rules governing the suppression of evidence should reflect "a concern for the limits to which judicial machinery can sustain the time-consuming demands and stresses of solving complex fact problems which are collateral to ultimate questions of fact." Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness,* 15 U.C.L.A. L. Rev. 32, 78-79 (1967).

The application of attenuation factors is difficult enough in the ordinary context of evidence acquired subsequent to and indirectly as a product of an illegal search or arrest; the complexities of attempting to identify and weigh the factors in a context to which the attenuation principle itself does not readily apply is not worth the burdens of the effort. How can one meaningfully consider, for example, the length of time between the Fourth Amendment vio-

lation and the procurement of the challenged evidence when the latter precedes the former? Similarly, how can one ask whether independent, untainted factors have intervened sufficient to attenuate the causal chain between the violation and the evidence when there really is no causal path, either direct or attenuated, between the two? Furthermore, how can one meaningfully apply the factor of the witness's free will when the testimonial capability of the witness was already known to the police at the time of the violation?

Thus, while we believe, as we next discuss, that the decision below could be reversed on the basis of conventional attenuation analysis, such a course would leave litigants and courts to struggle in future cases with difficult and largely irrelevant (to the policies of the exclusionary rule) efforts to analyze causal chains, free will, flagrancy of violation, and so forth.

In similar contexts under the Fourth Amendment this Court has rejected a case-by-case approach and has adopted general principles precluding suppression without regard to the flagrancy of the particular violation, the subjective purposes of the police, or other particular circumstances of the case. See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165 (1969) (use of evidence seized in violation of rights of persons other than the defendant); *United States* v. *Janis*, *supra* (use in federal civil cases of evidence unlawfully seized by state officers); *United States* v. *Calandra*, *supra* (use of unlawfully seized evidence in

grand jury proceedings); *Oregon* v. *Hass*, 420 U.S. 714 (1975) (use of improperly obtained evidence for impeachment purposes); *Frisbie* v. *Collins*, *supra* (prosecution of unlawfully seized defendant). Those decisions are based in large part on the conclusion that a rule allowing the possibility of suppression in each context would, as a general matter, impose a cost far in excess of its incremental deterrent benefit, and implicitly on the conclusion that sound judicial administration does not warrant or require a particularized determination of the propriety and utility of suppression in each individual case. In our view, the same considerations of deterrence, social cost, and sound judicial administration warrant recognition of the principle that the exclusionary rule does not apply to cases where the challenged evidence was known to the police before the occurrence of some unlawful act that served only to link the evidence to a particular individual.

II. EVEN IF OWENS' IN-COURT IDENTIFICATION WERE PROPERLY DEEMED A "FRUIT" OF RESPONDENT'S DETENTION, IT SHOULD NOT HAVE BEEN SUPPRESSED

We have argued above that Owens' in-court identification is not a "fruit" of respondent's unlawful detention for exclusionary rule purposes, and that principles of attenuation developed by this Court in considering the relationship between a Fourth Amendment violation and subsequently acquired evidence are not readily applicable to previously obtained informa-

tion. If the Court disagrees with that submission, however, and concludes that Owens' testimony can be considered a "fruit" of respondent's detention for exclusionary rule purposes, established principles of attenuation (as best they can be applied), support its admission.

The considerations relevant to determining whether a taint has been attenuated have been set forth most comprehensively in *Wong Sun* v. *United States*, *supra*, *Brown* v. *Illinois*, *supra*, and, with specific reference to live witness testimony, *United States* v. *Ceccolini*, *supra*.

In *Wong Sun*, which dealt with incriminating statements made by the defendants after their unlawful arrests, the Court stated the general principle (371 U.S. at 487-488; citations omitted):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

In *Brown* v. *Illinois*, which also dealt with incriminating statements made after an unlawful arrest, the Court reaffirmed the principle of *Wong Sun* and refined the analysis by identifying a number of factors relevant to determining whether verbal evidence

is sufficiently attenuated to purge the primary taint (422 U.S. at 603-604; footnote omitted):

> No single fact is dispositive. * * * The *Miranda* warnings are an important factor * * *. The temporal proximity of the arrest and the confession, the presence of intervening circumstances * * *, and particularly, the purpose and flagrancy of the official misconduct are all relevant.

In *Ceccolini*, the Court upheld the relevance of the *Brown* v. *Illinois* factors in determining the admissibility of the trial testimony of a witness whose identity and knowledge of the crime was discovered by the police as a result of an unlawful search. But in addition the Court stressed that a particularly relevant factor in the context of live-witness testimony is the free will of the witness in testifying (435 U.S. at 276-277). And it also emphasized that in that context, the "enormous cost engendered" by permanently disabling a witness from testifying about relevant matters warrants "the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." 435 U.S. at 277, 280.

In sum, application of conventional attenuation analysis calls for evaluation of four factors—temporal proximity between the violation and the acquisition of the challenged evidence; the presence or

absence of intervening events contributing along with the illegal search or seizure to its acquisition; the character of the violation in terms of its purpose and flagrancy; and the free will of the witness in the case of testimonial "fruits." In the case of live witness testimony, these factors are to be weighed in a fashion reflecting reluctance to suppress such evidence. We now consider these factors, in ascending order of importance to the proper disposition of this case.

1. *Temporal proximity.* The court of appeals characterized this as "the least influential element of attenuation analysis" (Pet. App. 39a), and, at least in the present context, we agree. In the conventional attenuation case, the initial illegality launches a chain of events that, with varying immediacy and directness from case to case, leads to discovery of the challenged evidence. The time span between violation and discovery of evidence will often correlate strongly with the foreseeability to the police that their misconduct would produce the evidence, and is thus material to the attenuation analysis. But where the evidence is not a product of the search, being already in the possession of the police, the temporal factor has no meaningful role to play.[26]

[26] Since the "fruit" of respondent's detention was Owens' in-court testimony, it may be said that there was a delay of 3½ months between the violation and the benefit. Whether that time is long or short for attenuation purposes is difficult to say, but we do not rely upon it in any event, since we doubt it would play a significant role in influencing police behavior, which was here motivated primarily by the desire to obtain the suppressed pretrial identification.

2. *Intervening events.* As with temporal proximity, the absence of a meaningful cause-effect relationship here between the illegality and a subsequent discovery of evidence diminishes the utility of this factor in the attenuation analysis.

There is, however, one intervening factor, not specifically addressed by the court of appeals, that we think significant in supporting a finding of attentuation: the determination by the trial court that Owens' in-court testimony was reliable and independently based, and therefore not subject to suppression as a fruit of the tainted pretrial identifications. To the extent the police illegally arrest or detain suspects in an effort to obtain both pretrial identifications and eventual in-court testimony, they can have no assurance whatsoever that their actions will not result in losing both. Whether the in-court testimony will be available thus depends upon the outcome of an unpredictable subsequent event, the judicial determination of its independent reliability. Thus, this factor supports a finding of attenuation in the present case.

3. *Free will of the witness.* The court of appeals did not examine this consideration, although *Ceccolini* dictates that it be considered. Owens' willingness to testify regarding the circumstances of the crime and to identify her assailant is beyond dispute, and this factor thus weighs in favor of a finding of attenuation.[27]

[27] The weight to be accorded this factor—which will always be present when the issue is suppression of the testimony of a victim—is debatable. When, as in *Ceccolini*, there is a conven-

4. *The character of the Fourth Amendment violation.* The attenuation factor that is least distorted by the absence of a conventional cause-effect relationship between the police misconduct and the challenged evidence concerns the character of the violation, in terms of its purpose and its flagrancy. In largt part that is because this factor is pertinent not so much to the effort to identify the strength of the nexus between the violation and the evidence as to more general considerations of exclusionary rule policy. To the extent that a violation is neither purposeful nor flagrant, suppression of evidence on account of the violation is less likely to be viewed by society as legitimate and proportional to the wrong, and is also less likely to exert a beneficial influence upon future police behavior.

Although we have not contended that respondent's detention was based upon information amounting to probable cause or that it was sufficiently brief to have been warranted on less than probable cause under the *Terry* v. *Ohio* line of cases, it exceeded the line of permissible action, if at all, only marginally.[28]

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tional cause and effect relationship between the violation and the discovery of a witness, the factor is significant in part because the substantial likelihood that such witnesses will come forward in any event diminishes police incentives to employ improper means to discover them (see 435 U.S. at 276). When, as here, the police already know the witness's testimonial capability, it is more difficult to know how to weigh the factor of free will in the analysis.

[28] Had the detaining officers in this case read some of the recent decisions of the District of Columbia Court of Appeals, they might have been doubly surprised to learn that their

First, the information known to the police before they took respondent to the police station and on which their suspicions were based was substantial. Three victims of robberies at the same location and closely spaced in time had given the police a relatively detailed description of their assailant as a dark complexioned, smooth-skinned youth of about 16-18 years of age and of about 5'5" to 5'8" in height (A. 11, 31, 65-66). Three days after the second set of robberies, police officers saw a person fitting that description near the same location, asked him for his name and address, and were informed that "he [had] walked away from school" (A. 32-33). They did not detain him further at that time, but sought additional information from a tour guide, who tentatively identified respondent as the person he had seen "standing around" on January 3, the day of the Owens robbery (*ibid.*) The officers then approached respondent again and sought, unsuccessfully, to take

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detention of respondent violated the Fourth Amendment. That court has held, soundly we believe, that it is reasonable and within the scope of *Terry* to detain a person stopped on reasonable suspicion—and if necessary to transport him to the scene of the crime—for the purpose of determining whether eyewitnesses can identify him. See *Franklin* v. *United States*, 382 A. 2d 20, 23 (D.C. Ct. App. 1979); *Cooper* v. *United States*, 368 A. 2d 554 (D.C. Ct. App. 1977); see also *United States* v. *Wylie*, 569 F. 2d 62, 70-71 (D.C. Cir. 1977). It is debatable whether the detention here was materially different. Even though the detention involved transporting respondent to the police station, as in *Brown* v. *Illinois*, and *Dunaway* v. *New York*, it nevertheless differed materially from both of those cases both in the degree of intrusion and in the reasonableness of the basis for the police action (see pages 51-55, *infra*).

his photograph at the scene; only then did they decide to take him to Park Police headquarters, where they photographed him, telephoned his school, and released him in less than an hour. Furthermore, the officers did not formally arrest respondent or charge him with any offense (A. 38), they did not question him about the robberies (Tr. 70-71), and respondent never objected to having his photograph taken (A. 41-42). In short, the reasons for the detention were substantial, the intrusion on respondent's constitutionally protected interests was relatively limited, and nothing in the circumstances of the case supports an inference that the officers were acting in willful disregard of what they understood to be their lawful authority.[29]

The court of appeals did not disagree with what we have said about the circumstances of respondent's detention. Rather, it found conclusive in the respondent's favor, in considering this attenuation element, the fact that a specific purpose of respondent's

[29] Moreover, in addition to the information supporting the officers' suspicions of respondent, there was also a reasonable basis for their belief that the detention was authorized by respondent's statements indicating that he might have been a truant. While respondent disputed that the officers had reasonable ground to believe that he was a truant, and the officers admitted that their reason for taking him to Park Police headquarters was at least in part in connection with their investigation of the robberies (A. 37), nevertheless, at a minimum, the fact that respondent admitted that he had simply walked away from school is relevant in considering the reasonableness (or conversely, the flagrancy) of the officers' actions.

detention was to obtain his photograph for exhibition to the robbery victims. While we do not doubt that the presence of an investigative motive is a relevant consideration weighing against the prosecution in the attenuation analysis, we believe that the court of appeals erred in making it the sole criterion and in overlooking the equally important and distinct consideration of the flagrancy of the violation. Since most Fourth Amendment violations are prompted by an investigative purpose (*Ceccolini*, which involved a search apparently motivated by nothing more than idle curiosity, is most unusual), a consideration only of purpose will have the effect of eliminating this factor from the attenuation analysis in nearly all cases.[30]

[30] *Brown* v. *Illinois*, *supra*, involved a violation of the defendant's rights that was both purposeful (*i.e.*, undertaken in the hope of obtaining a confession) and flagrant (*i.e.*, an extended seizure of the defendant's person, accompanied by other improper conduct, and justified by little more than hunch). If the Court had accepted the State's contention that *Miranda* warnings automatically attenuate any taint from an illegal arrest, its decision would have amounted to an open invitation to police to conduct arrests for interrogation wholly without regard to the existence of probable cause. In *Dunaway* v. *New York*, No. 78-5066 (June 5, 1979), while the conduct of the police was less offensive in certain respects than in *Brown*, the scope of the seizure of the defendant's person was similar in magnitude; indeed, the Court described the circumstances of the case as "virtually a replica of the situation in *Brown*" (slip op. 17). Where, as in both of these cases, the police conduct was both purposeful and flagrant, this factor obviously must be weighed against a finding of attenuation.

We do not believe that this Court intends to exclude from the attenuation analysis a meaningful consideration of the flagrancy of the violation, nor should it be excluded. To do so would risk severing the attenuation inquiry from the fundamental objectives of the exclusionary rule, which is not designed to deter all investigative efforts, but only those that infringe a citizen's constitutional rights. Where the conduct of the police is undertaken in good faith, without a recognition that it runs afoul of the Fourth Amendment, and in the face of substantial potential costs from other impacts of the exclusionary rule (see pages 31-36, *supra*),[31] the relentless exclusion of all "derivative" evidence will accomplish little of value to the administration of criminal justice.

While it is of course true that good faith is not an automatic bar to the application of the exclusionary rule, the degree of flagrancy, or offensiveness, of a particular violation as an objective matter is a reasonable and relevant indicator of whether the officers were acting in willful disregard of what they understood to be their lawful authority, see *Michigan* v. *Tucker*, *supra*, 417 U.S. at 447, and is a consideration that deserves substantial weight in ruling upon questions of attenuation of taint, see *Brown* v. *Illi-*

[31] In this respect the present case is sharply distinct from *Brown* and *Dunaway*, where admission of the confessions would have left police with little significant disincentive against taking suspects into extended custody for interrogation purposes.

nois, *supra*, 433 U.S. at 609-612 (Powell, J., concurring).

Finally, the court of appeals failed to heed this Court's admonition in *Ceccolini* that courts, in ruling on challenges to the testimony of live witnesses, should consider particularly the social costs of excluding that type of evidence, and that "the exclusionary rule should be invoked with much greater reluctance" (435 U.S. at 280) in the case of such testimony.[32] The Court's judgment on this point reflects the even more unequivocal judgment of Congress. See 18 U.S.C. 3502 (discussed at pages 57-58, *infra*). Those costs are particularly extreme when what is to be suppressed is the testimony of a victim of a crime, who has reported it to the police for the very purpose of seeking justice and the protection of the law.

In sum, even if Owens' in-court testimony could be properly analyzed as a potential fruit of the poisonous tree, established principles of attenuation warranted its admission into evidence.

III. THE TESTIMONY OF THE VICTIM OF A CRIME SHOULD NOT BE SUBJECT TO SUPPRESSION UNDER THE FOURTH AMENDMENT EXCLUSIONARY RULE

Even if Owens' testimony is properly characterized as a non-attenuated fruit of respondent's detention, it should not have been suppressed. Rather, the Court

[32] Whether other courts of appeals have fully heeded that admonition since *Ceccolini* is open to question. See *United States* v. *Scios*, 590 F.2d 956 (D.C. Cir. 1978); *United States* v. *Cruz*, 587 F.2d 277 (5th Cir. 1978); *United States* v. *Humphries*, *supra*.

should recognize a general exception to the exclusionary rule for the testimony of victims of a crime that is reliable and independently based on their recollection of the crime. The cost to society and the adverse impact on the administration of justice are too high to warrant the deterrent benefits, if any, of suppression of this kind of evidence.

Our position reflects the prevailing view of the courts of appeals on this question (see note 12, *supra*) and is aptly expressed in the opinion of District of Columbia Circuit in *Payne* v. *United States*, *supra*, 294 F.2d at 727:

> The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against [the defendant] in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified [the defendant] as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present one are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. Cf. *Frisbie* v. *Collins*, 1952, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541.

In our brief in *Ceccolini*, which did not involve the testimony of a victim, we argued for a similar exception applicable to live-witness testimony generally.

The Court, although it held the testimony to be admissible for many of the reasons that we urged in support of a general rule, declined to adopt such a rule and concluded that a case-by-case approach is appropriate, at least with respect to the kind of testimony involved in that case. 435 U.S. at 274-275.

Granting the appropriateness of a case-by-case inquiry in considering the admissibility of the testimony of ordinary witnesses, a different rule is nevertheless desirable in the special case of the victim of a crime, particularly a crime of violence. Depriving such an individual of the opportunity to appear at the bar of justice and testify against the person who injured him threatens to produce a resentment and disrespect for the law far in excess of and different in kind from that which may be engendered in the case of more disinterested witnesses.

As this Court said in *Ceccolini* of live-witness testimony in general (435 U.S. at 277), "[r]ules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, 'serious obstructions to the ascertainment of truth'; accordingly, '[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions.' C. McCormick, Law of Evidence § 71 (1954)."

We note in this connection that Congress has unequivocally declared that testimony such as that of Owens in the present case is not to be excluded. 18 U.S.C. 3502 states:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

While this statute technically does not apply to the Superior Court of the District of Columbia, which is not an Article III court, and while we are not here contending that the statute overrides constitutionally based requirements of exclusion, Congress's view of public policy and of the requirements of the Constitution is significant and entitled to considerable deference from the courts. *United States* v. *Watson*, 423 U.S. 411, 416 (1976). Indeed, the legislative policy so clearly reflected in Section 3502 should carry particular weight when the question before the Court concerns the proper scope of the exclusionary rule, which involves a necessarily predictive assessment of incremental deterrent effects and adverse social and judicial costs of alternative formulations of the rule. Those policies have special force in the case of a rule proposing to deny persons who are themselves the victims of crime access to the machinery of justice. This Court has never done so, and should not do so now.

CONCLUSION

The judgment of the court of appeals should be reversed.

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